In the Supreme Court of the United States

OCTOBER TERM, 1921.

WILLARD N. JONES, PLAINTIFF IN ERROR,
v.
THE UNITED STATES OF AMERICA. } No. 103.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The writ of error in this case presents for review the judgment of the Circuit Court of Appeals for the Ninth Circuit (R. 1026) affirming a judgment for $18,204.84 and costs in favor of the United States entered by the United States District Court for the district of Oregon (R. 69, 70), in an action at law tried before a jury, brought by the United States to recover the value of lands entered as homesteads, patents to which were obtained by fraud.

Opinion of the Circuit Court of Appeals, R. 1019–1026, 265 Fed. 235.

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THE FACTS.

The United States brought suit against Jones to recover $133,000, the value of land included in nine homestead entries which the complaint alleged were patented by the Government as a result of fraud and misrepresentation perpetrated at the instigation and with the connivance of Jones.

The scheme alleged in the complaint and developed by the evidence was this: Certain lands, heavily timbered, embraced within the former Siletz Indian Reservation in Oregon, were opened to homestead and certain other classes of entry pursuant to the provisions of the Act of August 15, 1894, ch. 290, 28 Stat. 286, sec. 15. That act ratified a treaty entered into with the Indians upon that reservation (pp. 323–326) and provided (p. 326) that the nonmineral lands ceded by the Indians should be disposed of under the provisions of the homestead law. The homesteader was required to pay $1.50 per acre for the land in addition to the usual fees exacted. There was a further provision that "three years' actual residence on the land shall be established by such evidence as is now required in homestead proofs."

Jones's attention was attracted to these lands, and he conceived the plan of locating old soldiers, Civil War veterans, upon them. He caused a cruise of the land to be made, procured a number of such veterans, through the exertions of one Wells, who was acknowledged to be his agent for such purpose,

to make homestead entries and submit final proof thereon. Preliminary to making filings each of the entrymen entered into a contract with Jones wherein it was agreed that Jones would locate him upon lands to be homesteaded, prepare the necessary filing papers, etc., build a house and cultivate such portion of the land as required under the law. Jones further agreed to advance, if required, the fees exacted at the land office to make and perfect the filing and also the necessary expenses of the entrymen, not to exceed $60. For such services Jones was to receive $185 for locating and preparing the papers, $100 for the house, $175 for cultivating the land, and the repayment of the sum advanced for fees and expenses, a total of $520.

There was a further provision that after final proof had been submitted, Jones, at the option of the entryman, would procure for the latter a loan not to exceed $720, to be secured by a mortgage upon the land homesteaded, and that immediately upon the procurement of the loan all sums of money due under the contract, as well as those advanced by Jones, should become payable and be paid out of the loan so secured; further, that if such loan was not desired, all moneys advanced, together with those agreed to be paid by the entryman, should become due and payable as soon as final proof was made.

A form of this contract is set out in the complaint. R. 12–15, and in the evidence, Government Exhibit 1, R. 140–143.

The theory upon which the suit was brought was that the purpose and intent of Jones in all these transactions was to procure these lands for his own benefit, through the instrumentality of these veterans, by a pretended or colorable compliance with the requirements of the applicable law; that the motive underlying the contract which he entered into with each entryman was to so bind the latter to him that the result would be the securing of the land for himself; and that the ostensible agency of Jones under the contract was merely a cover or blind to his real purpose.

The defendant in his answer (R. 25 *et seq.*) made what amounted to a general denial of the allegations of the complaint so far as any unlawful purpose was concerned, although he admitted the execution of the contracts and the mortgages. For separate answers and defenses (R. 40 *et seq.*) he averred that his intent was that the entryman should in all respects comply with the law; that in all particulars respecting the contracts and mortgages he acted in good faith without any purpose to deceive the United States. Further, that the final proofs submitted by eight of the entrymen showed on their face that three years' residence had not been maintained; that consequently the land office officials were not deceived by the same but allowed the proofs under a mistake of law, supposing that the military service of the claimants might be allowed to reduce the period of residence required under the special act by which the lands were opened to entry. As to the other entry,

that of Wells, who made commutation proof, it was alleged that his proof showed that he had *not* resided upon and cultivated the land for the fourteen months' period required in the case of commuted entries, and hence that, as to that entry, the land office was not deceived. It was also averred that the lands patented had been conveyed to innocent purchasers. The value of the lands as declared in the complaint was denied and it was averred that any recovery should be at the minimum price fixed by the special statute at which they might be acquired, namely, $1.50 per acre. R. 53.

There was also a plea of the statute of limitations (Act of March 3, 1891, ch. 561, 26 Stat. 1095, 1099), which it was averred barred the suit, since the complaint was not filed within six years from the issuance of the patents for the lands. R. 42.

To the separate defenses which alleged that the land department was not deceived, that the land had been conveyed to innocent purchasers, and that the suit was barred, the United States entered a demurrer. This was sustained as to the plea in bar but not as to the others. R. 56; 232 Fed. 218. Whereupon the Government filed a reply (R. 56 *et seq.*) which while admitting the facts as to the proofs, denied that the land officials were not misled and asserted that but for the fraud the patents would not have issued.

Although the record does not disclose it, we think it should be stated as a part of the chronology of the case that thereafter defendant moved for judgment upon the pleadings, which was granted and the cause

dismissed. Thereupon the United States sued out a writ of error; the Circuit Court of Appeals reversed the judgment and remanded the case with direction to overrule the motion for judgment, 242 Fed. 609. The case then proceeded to trial before a jury.

After the entry of judgment upon the verdict of the jury, a motion for a new trial was made and denied. R. 70. Thereupon a writ of error was sued out from the Court of Appeals (R. 2, 3) where, as already stated, the judgment was affirmed.

The errors assigned to support the writ of error in this court raise the following questions: (*a*) The sufficiency of the Government's pleadings to make a case against the defendant Jones; (*b*) the sufficiency of the evidence to warrant the verdict and judgment; (*c*) the correctness of rulings as to the admission of evidence; and (*d*) the correctness of a portion of the charge to the jury and of the refusal to give certain requested charges.

In support of our position that the judgment of the court below was correct, we submit the following propositions:

1. The Government's pleadings state a cause of action against Jones.

2. There was ample evidence adduced to support the finding of the jury that defendant was guilty of the fraud and misrepresentation charged against him.

3. There was no prejudicial error in the rulings of the court on the admission of evidence.

4. The court's charge to the jury was fair, proper, and no substantial errors appear therein nor in respect to rulings on requested charges.

ARGUMENT.

I.

The Government's pleadings state a cause of action against Jones.

Plaintiff in error is again contending, as he did twice unsuccessfully in the Circuit Court of Appeals, that the pleadings state no cause of action against him.

To support this contention it is urged that as the proofs submitted by the several entrymen showed upon their face that the law as to residence had not been complied with for the requisite period, patents should not have issued; that the issuance thereof was due to a mistake of law by the land department and that, as under a proper construction of the law the proofs were not acceptable, the misrepresentations as to the intent when the entries were made and perfected were immaterial.

Otherwise stated, Jones says that three representations were made: (*a*) that the entrymen intended to make the lands entered their homes; (*b*) that each made the entry for his own use and benefit and not for another; and (*c*) that the law had been complied with as to residence and cultivation for a specified time. He admits that these were false, but says that as the third representation did not go far enough, the other two do not matter.

We answer by saying the homestead law requires that an entry thereunder shall be made with the intent to make the land a home and that it is essential that the entry be made solely for the use and benefit of the entryman. These conditions are just as essential and important as compliance with the requirements as to residence and cultivation. Without them no application to enter can properly be allowed nor patent issued thereon. If the entryman fails in any of these points, it is the same as if he had violated *all* the law. Meeting all other requirements will not avail.

These entrymen, when they applied to enter the lands, made affidavit that they intended to make the same their home and sought to acquire them for their own use and benefit and not for another. This was false, and without those statements the entries would not have been allowed. Had the truth been known the applications would have been rejected, and there would have been no opportunity or occasion for final proofs. Jones set in motion these operations. Can he now escape responsibility for the natural consequences of that first unlawful step?

Furthermore, had it been known when the proofs were considered by the land department that the same unlawful intent persisted it would not have made any mistake as to the construction of the law, for the proofs would undoubtedly have been rejected and the entries cancelled for lack of home-making intent and of acquisition for the sole use and benefit

of the entrymen. Fundamentally, Jones was responsible for the mistake of law made by the land department. In any event, he cannot now ask the court to speculate as to whether the misrepresentations as to residence and cultivation were indeed the sole basis for the issuance of the patents. These representations were false; they were material; they deceived the Land Department; without them, the allowance of the entries and the issuance of patents would not have occurred.

It is not necessary that the false representation should have been the *sole* inducement to a contract. A person who has by misrepresentation induced another to enter into a contract will not generally be heard to deny its materiality; and it is enough if the party deceived can show that the misrepresentation had a *substantial* effect in inducing the contract, and that, without it, he would not have entered into the transaction. *Safford* v. *Grout*, 120 Mass. 20, 25; *Windram* v. *French*, 151 Mass. 547, 553; *Jordan* v. *Pickett*, 78 Ala. 331, 338, 340; *Winter* v. *Bandel*, 30 Ark. 362, 373; *Addington* v. *Allen*, 11 Wend. 374, 381; *Fishback* v. *Miller*, 15 Nevada, 428, 442; *James* v. *Hodsden*, 47 Vt. 127, 137; *Clarke* v. *Dickson*, 6 Com. Bench (N. S.) 452; *Sioux Nat. Bank* v. *Norfolk State Bank*, 56 Fed. (C. C. A.) 139, 141; *Tooker* v. *Alston*, 159 Fed. (C. C. A.) 599, 603, 604.

As was well said by the Supreme Court of Vermont in *Cabot* v. *Christie*, 42 Vt. 121, 127:

> What the plaintiff would have done but for the false representation, is often a mere speculative enquiry, and is not the test of the plaintiff's right. If the false representations were material and relied upon, and were intended to operate and did operate as one of the inducements to the trade, it is not necessary to enquire whether the plaintiff would or would not have made the purchase without this inducement.

Clearly under the law and the facts presented a case was made out against Jones.

II.

There was ample evidence adduced to support the finding of the jury that defendant was guilty of the fraud and misrepresentation charged against him.

Under the well settled rule that on a writ of error to review a judgment entered upon a verdict of a jury, questions of law only are considered, the only point with respect to the finding of the jury open here is whether there was any competent evidence sufficient to warrant that finding. It is impossible to read the record in this case without reaching the conclusion that an abundance of such evidence was presented at the trial. Of the nine men to whom the lands here involved were patented, only three were living at the time of the trial and those three, Wells, Connor, and Hunter, were called as witnesses

by the Government. The testimony of others who entered into like contracts with Jones was presented by the Government and admitted for the purpose of showing the defendant's intention. Witness after witness testified with respect to the transactions had with Jones. The testimony of one is substantially that of all. It is to this effect:

The entrymen were with one exception residents of Portland, Oregon; they heard through Wells of the plan conceived by Jones to have entries taken up in the Siletz country by Civil War veterans; they entered into the contract which had been prepared by Jones; they were taken in parties to the land by Wells or Potter, the latter an attorney working with Jones in the matter; they were shown the claims assigned to them; they were taken to the local land office where filings were made; the expenses of the filings and of the trip were paid by Jones; about six months later they were notified that they must visit their claims; they spent one or two nights in the locality; some slept in their cabins which has been erected by Jones, others stayed at the "headquarters camp" maintained by Jones, where they were all subsisted; in some instances the visit to the claim was about an hour or two in duration; six months later another similar trip was made with like incidents; none of the entrymen paid anything for expenses; everything was furnished them; they were told when final proof must be made; the publication of notice of intention to make proof was at-

tended to by Jones or his agents, who arranged for the proof witnesses; the entrymen never gave up their previous places of residence or abode; they had no intention of making the land entered a home. The cabins erected on the claims were habitable but no furniture was ever put in them. Some slashing was done, usually of about an acre, by men employed by Jones; a few trees were set out or a planting of some vegetables. All the entrymen here involved executed a mortgage to Jones and received from him $200 in cash. Four of the patentees deeded to one Sisler, a trustee for Jones; the others to one Montague.

With respect to the intent of Jones, the testimony of J. L. Wells, his acknowledged agent in procuring the soldiers to make filings, is significant. In the course of his examination he was asked (R. 150):

> Q. What did Mr. Jones tell you as to his idea and purpose in having you see these old soldiers to file on this land?
>
> A. I think the purpose was to get possession of them in some way or other, in buying them from each one that took up the land.
>
> Q. Who was to get possession of them?
>
> A. I think it was Mr. Jones, or whoever he wanted to.

As to the purpose for which the entries were made, the following from the testimony of Wells is important (R. 196):

> Q. What did you do with your land after you got your title?
>
> A. I sold it to Mr. Jones for $200.

Q. And was that the understanding you had in the beginning, that you were to do that?
A. That was the understanding.

We think it is clear that the plan followed by Jones was *in essence* the old "dummy entry" plan. These old soldiers with one or two exceptions were impecunious: could not hope to pay Jones what was stipulated under the contract and only expected to get something out of the deal when title was secured. Instead of following the old dummy scheme by merely having verbal agreements that the entryman should allow his name to be used and upon deeding to the procurer receive $200 for his services, Jones proceeded more artfully by attempting to conceal the real nature of the transaction and to give it a color of honesty. The result, however, was expected to be the same. $200 was paid the entryman when he executed the mortgage. Jones expected that the mortgage would not be paid, and while it is true that the patentee might deed to some one else subject to the mortgage, the probability was that the sale would be made to Jones, since the patentee knew Jones to be interested in the proposition and had dealt exclusively with him. In the event of a sale to another, Jones could not lose since he was protected by the mortgage.

In the face of all this evidence, the jury certainly had ample warrant in finding that the patents to these nine entries were obtained by fraud and misrepresentation for which Jones was responsible as instigator.

III.

There was no prejudicial error in the rulings of the court on the admission of evidence.

Plaintiff in error questions the action of the trial court in admitting the evidence of one Miller, an attorney at law who represented certain persons who filed contests in the local land office against certain entries other than those in this suit, made by individuals under similar contracts with Jones. Bill of exceptions, R. 93 *et seq.* The witness Miller was permitted to testify that Jones made a proposition to pay $200 to compromise each of those contests.

This evidence was offered merely to show the intent upon the part of Jones concerning all his dealings in regard to the Siletz lands. Such evidence was properly admitted for that purpose, for the intent of Jones in the transactions affecting these nine claims in suit was a material element in the case and his action as to other matters of like nature was relevant in establishing that motive or intent. Moreover, a reasonable discretion is allowed the trial court in such matters. *Wood* v. *United States*, 16 Pet. 342, 347, 349, 360; *New York Mut. Life Ins. Co.* v. *Armstrong*, 117 U. S. 591, 598, 599; *Moore* v. *United States*, 150 U. S. 57, 60, 61; *Exchange Bank* v. *Moss*, 149 Fed. 340, 341, *et seq.*

Error is assigned upon the admission of certain evidence as to the value of the lands in controversy. Assignments V to VIII, inclusive, R. 1029, 1030; Bill of exceptions, R. 96–104.

We do not know to what extent the objection to this evidence goes, but it appears that these witnesses by whom the Government sought to establish the value of these lands were familiar with the general locality; three of the four had cruised lands in townships very near the township in which the lands were situated. They were permitted to testify as to what timber lands in those near-by townships sold for in 1902, which was about the time when the entries were patented. Their statements were based upon newspaper reports of sales or upon what they had heard.

We think this evidence competent, and hence properly admitted, to show the value of the lands in suit. In establishing the value of land, evidence may be received of the value of near-by similar land, or of sales of such latter land not too remote in point of time, and evidence regarding sales is not incompetent because based upon hearsay, or knowledge obtained by one in the course of business, or through such sources as are commonly relied upon in such transactions. *Cliquot's Champagne*, 3 Wall. 114, 141; *Montana Ry. Co.* v. *Warren*, 137 U. S. 348, 352, 353; *Virginia* v. *West Virginia*, 238 U. S. 202, 212; *Sanitary District* v. *Boening*, 267 Ill. 118, 121, 122; *Whitney* v. *Thacher*, 117 Mass. 523, 527; *Fourth Nat. Bank* v. *Commonwealth*, 212 Mass. 66, 68; *Erk* v. *Simpson*, 137 Ga. 608, 613; *Betts* v. *Southern Calif. etc., Exchange*, 144 Calif. 402, 409; *Lynch* v. *United States*, 138 Fed. (C. C. A.) 535, 538, 539.

IV.

The court's charge to the jury was fair, proper, and no substantial errors appear therein nor in respect to rulings on requested charges.

Several assignments of error go to the charge of the court to the jury and to refusals to charge.

The charge was a very comprehensive one, in which the court went to considerable pains to make clear to the jury the law applicable to the case. It was fully as favorable to the defendant as it could properly be, and certainly was not prejudicial to him.

The requests refused were largely other forms of what had been substantially included in the charge as given, and it was not necessary or proper for the court to repeat in the language of the defendant what had already been said.

One portion of the charge is particularly pointed to as error. It is that which related to the measure of damages. Bill of exceptions, R. 113, 114. In brief, the court instructed the jury that if they found for the Government, the amount of recovery to which the latter would be entitled would be the market value of the lands at the time of the issuance of final certificates upon the entries, "*with legal interest at the rate of 6 per cent per annum from that date to this.*"

If the error asserted as to this charge go to the matter of allowance of interest at all, it is clearly untenable, for interest may be allowed in cases of tort. *Lincoln* v. *Claflin*, 7 Wall. 132, 139; *Eddy* v. *Lafayette*, 163 U. S. 456, 467; *District of Columbia* v *Robinson*, 180 U. S. 92, 107, 108; *Bates* v. *Dresser*, 251

U. S. 524, 531. However, if it is contended that the question of allowance of interest was for the discretion of the jury, that view is undoubtedly supported by the decisions of this court just cited.

But it is not clear that the court did not by its charge intend to indicate to the jury that interest was to be allowed in its discretion. The New York Court of Appeals, in *Wilson* v. *City of Troy*, 135 N. Y. 96, 103, so construed a similar charge.

Moreover, interest is allowable as a matter of *right* in the case of conversion, and we can perceive no valid reason why, if it is allowed when one's personal property is wrongfully taken, it should not be allowed when one's real property is so taken.

In any event, the exception taken to the charge was general, did not point out to the court the specific point in which the charge was deemed erroneous, and therefore is not open here. *Lincoln* v. *Claflin, supra; Southern Pacific Co.* v. *Arnett*, 126 Fed. (C. C. A.) 75, 80, 81. This was the view taken by the Court of Appeals. (R. 1025, 1026, 265 Fed. 241, citing *Hammond* v. *United States*, 246 Fed. 40, 47.)

CONCLUSION.

The judgment of the Circuit Court of Appeals was right and should be affirmed.

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JANUARY, 1922.

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